Supreme Court
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No. 96-129

In The

Supreme Court of the United States

October Term, 1995

EDWARD BRODNICKI,

Petitioner,

vs.

CITY OF OMAHA, NEBRASKA, a Municipal Corporation, COUNTY OF DOUGLAS, a Nebraska Political Subdivision, PATRICK A. McCASLIN, KEVIN DONLAN, JEFFERY J. THEULEN, JOHN SKANES, JOHN SWANSON, MICHAEL HOCH, and JAMES JANSEN,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF OF RESPONDENTS COUNTY OF DOUGLAS AND JAMES JANSEN IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

Petitioner has presented two issues for review, only one of which relates to Respondent James Jansen.

Petitioner claims that the County Attorney lost the protection of absolute immunity when he assigned the trial to a deputy and, therefore, was not immune from suit when he reviewed the case for dismissal.

Pursuant to Sup. Ct. R. 15, Respondent James Jansen notes that Petitioner has not stated the facts of the case in a manner sufficient for Respondent to enter an objection to their accuracy at this time. Although Petitioner states he was prosecuted by the County Attorney, it should be noted that charges were dismissed prior to trial.

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OPINIONS BELOW, JURISDICTION, CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

In an unpublished Memorandum Opinion entered July 7, 1994, the Honorable Lyle E. Strom, then Chief United States District Judge for the District of Nebraska, granted Respondent Douglas County and Respondent James Jansen's Motion for Summary Judgment. Following the granting of summary judgment for the remaining Respondents, the entire matter was dismissed by the District Court. *Brodnicki v. City of Omaha*, 874 F.Supp. 1006 (D. Neb. 1995).

Petitioner filed a notice of appeal and, upon presentation of briefs and oral argument, the Eighth Circuit Court of Appeals affirmed the decision of the District Court. *Brodnicki v. City of Omaha*, 75 F.3d 1261 (8th Cir. 1996).

The decision dismissing Respondent Douglas County was not challenged before the Eighth Circuit Court of Appeals. Respondent James Jansen acknowledges the jurisdiction of this Court to review the Petition for Writ of Certiorari and does not dispute Petitioner's statement of statutes involved.

STATEMENT OF THE CASE

In March, 1992, Edward Brodnicki was arrested for the attempted kidnapping of a nine-year-old girl. Following a preliminary hearing, Brodnicki was bound over for trial and released on bond. Several months later, investigators hired by Brodnicki brought information to the

County Attorney who, upon confirming this information, dismissed the charges.

The action against Respondents Jansen and Douglas County, brought under 42 U.S.C. §1983, alleged Jansen violated Petitioner's due process rights by prosecuting him for attempted kidnapping and that Jansen's actions were taken pursuant to the policies and practices of Douglas County. A Motion for Summary Judgment was filed on October 5, 1993, on behalf of Jansen and Douglas County. The District Court found Jansen, in his role as County Attorney, entitled to absolute immunity for his actions. The Court further found no basis for liability on the part of Douglas County. Both Jansen and Douglas County were dismissed upon the filing of the Memorandum Opinion and Order on June 13, 1994. Following the granting of motions for summary judgment in favor of the named Omaha Police Officers and the City of Omaha, the case was dismissed on February 24, 1995.

The District Court decisions were appealed to the Eighth Circuit. On January 31, 1996, the Eighth Circuit affirmed the District Court's decision. Petitioner's Petition for Rehearing and Suggestion for Rehearing En Banc were denied on March 25, 1996.

Petitioner now seeks review of this Court on the issue of whether or not Respondent Jansen's actions as County Attorney fell outside the protection of absolute immunity.

STATEMENT OF FACTS

The facts pertaining to Respondent Jansen are undisputed. On March 17, 1992, Petitioner was arrested by the City of Omaha police officers for the attempted kidnapping of a nine-year-old girl. On or about March 18, 1992, Douglas County Attorney James S. Jansen, Deputy County Attorney Linda Caster-Senff, and Chief Deputy County Attorney Donald W. Kleine reviewed the matter and police reports and charged Brodnicki with attempted kidnapping in violation on Neb. Rev. Stat. §28-313(1) 1943 (Reissue 1989). On March 19, 1992, a criminal complaint was filed against Brodnicki. A preliminary hearing was held on April 7, 1992, in which Brodnicki cross-examined the State's witnesses. He declined an opportunity to present evidence. At the conclusion of the hearing, probable cause was found and Brodnicki was bound over for trial and released on bond.

On or about April 17, 1992, Petitioner's counsel contacted Respondent to discuss the results of a polygraph examination that was conducted at the request of and by the Petitioner. Neither Jansen nor any of his staff participated in the polygraph examination.

On or about June 16, 1992, a Motion for a review of the Petitioner's bond was filed. A hearing was held on that Motion June 18, 1992. At that time, the Petitioner informed the prosecutor that he intended to call seven witnesses. The Court continued the revocation hearing. Following this initial hearing, an investigator for the prosecutor interviewed the Petitioner's prospective witnesses. Subsequent to these interviews, the prosecutor withdrew the Motion to revoke the Petitioner's bond.

The criminal trial of the Petitioner was scheduled to commence on October 19, 1992. On or about October 15, 1992, the Petitioner identified to the prosecutor thirty potential witnesses. On October 19, 1992, the Court sustained a Motion to continue the trial and to set another pretrial conference for November 16, 1992. On or about November 12, 1992, Brodnicki provided the prosecutor with photocopies of Affidavits of three of his potential witnesses who were expected to provide exculpatory testimony. Subsequently, the prosecutor met with the prospective witnesses and reviewed their statements. Additionally, the prosecutor met with the complaining victim and her parents and, as a result of these meetings, sought and obtained dismissal of the criminal charges against Brodnicki.

On March 16, 1993, Petitioner filed suit in the United States District Court which was dismissed following granting of motions for summary judgment in favor of all Respondents. On February 24, 1995, Respondent Jansen was specifically found to have absolute immunity.

The summary judgment decisions were affirmed by the Eighth Circuit Court of Appeals and Petitioner's Petition for Rehearing and Suggestion for Rehearing En Banc denied. No issues were raised at this level relating to the role of Respondent County of Douglas.

Petitioner centered his appeal around specific actions of Respondent Jansen and asserted that in obtaining, reviewing, and evaluating evidence in preparation of this matter for prosecution, Respondent Jansen had shed the

cloak of absolute immunity his role as advocate for the state affords him.

ARGUMENT

The Petition for Writ of Certiorari should be denied as there is no compelling reason for this Court to reconsider the well-settled issue of absolute immunity. Both the District Court and the Appellate Court decisions were based solidly on relevant decisions of this Court, and neither decision conflicts with prior decisions on this important issue.

Petitioner suggests this Court needs to design a bright line rule more fully identifying which actions of a prosecutor are protected by absolute immunity. The functional approach that this Court has taken serves to create just such a line without burdening the judicial system with the task of micro-managing the individual prosecutorial activities.

The functional approach adopted by this Court looks to the nature of the function performed by the prosecutor. *Buckley v. Fitzsimmons*, 113 S.Ct. 2606 (1993). When acting as an advocate for the state, the prosecutor is entitled to the protections of absolute immunity. *Id.*, at 2615. A prosecuting attorney is required to constantly, in the course of his duties as an advocate for the state, make decisions on a wide variety of sensitive issues including questions of whether to file an Information, whether and when to prosecute, and whether to dismiss a criminal action. *Imbler v. Pachtman*, 424 U.S. 409 (1976).

Petitioner asserts that Jansen's review of polygraph reports and meetings with Brodnicki's defense counsel were purely administrative. It is undisputed that Petitioner's counsel brought the polygraph to the prosecutor for his review after probable cause had been determined and Brodnicki had been bound over for trial. As an advocate for the State, the prosecutor had an obligation to review any and all exculpatory evidence presented to him, even if such evidence would be inadmissible in court. *Id.*

Petitioner further asserts that because Jansen delegated the reponsibility for the prosecution of this case to his deputies, his role was merely administrative.

> At oral argument, Brodnicki's counsel conceded that the primary reason he went to Jansen with the polygraph results was to persuade Jansen to dismiss the charges. In short, counsel asked Jansen to exercise his professional judgment and Jansen did so, although not with the immediate result counsel wished.

Brodnicki v. City of Omaha, 75 F.3d 1261 (8th Cir. 1996), at 1267.

By requesting that Jansen personally meet with his counsel and review polygraph reports, Brodnicki recognized Jansen's discretionary ability to determine whether or not this criminal case would proceed. There is no need for this Court to review the function of Jansen's activities when Petitioner has made such an admission.

It is essential to the proper functioning in the criminal justice system that the County Attorney, even though he has assigned a deputy to take the case to trial, be able

to perform those functions necessary to determine whether or not to take a case forward to trial or to dismiss the action.

If the prosecutor were not entitled to absolute immunity for performing the acts complained of by Petitioner, the potential for liability could prevent the vigorous and fearless performance of the prosecutor's duty.

The safeguard to potential "corruption" of the prosecutor's office lies not in the articulation of bright line rules by this Court but within the democratic process itself. The public body has the power to elect a county attorney in whom they have full confidence and trust.

CONCLUSION

Neither the decision of the District Court nor the Court of Appeals departed from the usual and standard course of judicial proceedings so as to justify this Court's exercise of its discretionary power of review. Rather, they comport in all respects with the standards that this Court has previously and consistently adopted.

Respondent James Jansen respectfully requests that this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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